STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	)	
	)	
On Its Own Motion	)	
	)	ICC Docket No. 11-0710
In re Proposed Contracts between Chicago	)	
Clean Energy, LLC and Ameren Illinois Company	)	
and Between Chicago Clean Energy, LLC and	)	
Northern Illinois Gas Company for the Purchase	)	
and Sale of Substitute Natural Gas Under the	)	
Provisions of Illinois Public Act 97-0096.	)	

DRAFT PROPOSED ORDER
OF CHICAGO CLEAN ENERGY, LLC

Chicago Clean Energy, LLC ("CCE"), by and through its attorneys, DLA Piper LLP (US), pursuant to Section 200.810 of the Rules of Practice of the Illinois Commerce Commission ("Commission") (83 Ill. Admin. Code 200.810), respectfully submits its Draft Proposed Order in the instant proceeding addressing revisions to the Sourcing Agreement for the clean coal SNG brownfield facility to be approved by the Commission in accordance with Public Acts 97-0096 and 97-0630.

I.

INTRODUCTION

CCE is seeking to construct and develop a clean coal SNG brownfield facility, as defined in the Illinois Power Agency Act ("IPA Act"). (*See* 20 ILCS 3855/1-10.) A "clean coal SNG brownfield facility" is defined as:

> a facility that (1) has commenced construction by July 1, 2015 on an urban brownfield site in a municipality with at least 1,000,000 residents; (2) uses a gasification process to produce substitute natural gas; (3) uses coal as at least 50% of the total feedstock over the term of any sourcing agreement with a utility and the remainder of the feedstock may be either petroleum coke or coal, with all such coal having a high bituminous rank and greater than 1.7 pounds of sulfur per million Btu content unless the facility reasonably determines that it is necessary to

> use additional petroleum coke to deliver additional consumer savings, in which case the facility shall use coal for at least 35% of the total feedstock over the term of any sourcing agreement; and (4) captures and sequesters at least 85% of the total carbon dioxide emissions that the facility would otherwise emit.

(*Id.*) As recently amended by Public Acts 97-0096 and 97-0630, Section 9-220(h-4) of the Illinois Public Utilities Act (the "Act") sets forth the Commission's role in the approval process for "sourcing agreements," the long-term contracts between CCE and natural gas utilities for purchase of substitute natural gas ("SNG") to be produced at CCE's facility ("Sourcing Agreement"):

> "No later than 90 days after the Illinois Power Agency submits the final draft sourcing agreement pursuant to subsection (h-1), **the Commission shall approve a sourcing agreement containing (i) the capital costs, rate of return, and operations and maintenance costs established pursuant to subsection (h-3) and (ii) all other terms and conditions, rights, provisions, exceptions, and limitations contained in the final draft sourcing agreement; provided, however, the Commission shall correct typographical and scrivener's errors and modify the contract only as necessary to provide that the gas utility does not have the right to terminate the sourcing agreement due to any future events that may occur other than the clean coal SNG brownfield facility's failure to timely meet milestones, uncured default, extended force majeure, or abandonment.** Once the sourcing agreement is approved, then the gas utility subject to that sourcing agreement shall have 45 days after the date of the Commission's approval to enter into the sourcing agreement."

(220 ILCS 9-220(h-4). Emphasis added.) Thus, the vast majority of the terms of the Sourcing Agreement that is to be executed by the utilities have been decided by the Illinois Power Agency ("IPA"), as reflected in the final draft sourcing agreement that it provided to the Commission. In addition, the capital costs and operations and maintenance costs also already have been determined pursuant to the process set forth in Section 9-220(h-3) of the Act, and the Commission has set a rate of return, as documented by the Commission's Interim Order dated December 7, 2011 entered in this docket.

Accordingly, at this time, the remaining statutorily-required tasks for the Commission are to correct typographical and scrivener's errors; modify the termination provisions; and approve the Sourcing Agreement as so corrected and modified.

On December 14, 2011, CCE circulated a Corrected Version of the Form of SNG Agreement as Issued by the Illinois Power Agency on October 11, 2011 (the "CCE Corrected Agreement"). On December 16, 2011, the Commission Staff ("Staff"), Northern Illinois Gas Company ("Nicor Gas"), the Attorney General's Office (the "AG"), , and the Illinois Power Agency (the "IPA") each filed Statements of Position. Neither Ameren Illinois nor any other intervenor filed a Statement of Position. On December 20, 2011, CCE filed Verified Reply Comments and a Draft Proposed Order.

II.

TYPOGRAPHICAL AND SCRIVENER'S ERRORS

CCE Position

When CCE filed its Corrected Agreement on December 14, 2011, CCE also filed a summary chart identifying each of its edits as typographical or scrivener's errors. In its December 20, 2011 Verified Reply, CCE provided a detailed explanation of the basis for those revisions, and can be summarized as follows:

- **Consolidation of "Buyer's Sharing Percentage" and "Buyer's Allocated Percentage."** CCE noted that the IPA's final draft sourcing agreement uses these two terms interchangeably, and provides several examples. In order to avoid confusion -- especially considering "Buyer's Sharing Percentage" is not a defined term -- and redundancy, CCE proposed changing all instances of "Buyer's Sharing Percentage" to "Buyer's Allocated Percentage." (*See* CCE Verified Reply Comments at 17-19.)

- **Clarification of "Applicable MCQ" vs. "MCQ."** Under the IPA's final draft sourcing agreement, the "Monthly Contract Quantity" or "MCQ" describes the amount of substitute natural gas ("SNG") CCE must sell and the natural gas utilities must take. The MCQ can be increased under certain circumstances to the "Increased

MCQ". The term "Applicable MCQ" should be used to refer to situations where the amount could be either the "MCQ" or the "Increased MCQ". CCE proposed revisions that would clarify CCE's obligations to the natural gas utilities as well as the utilities' obligations to CCE, and would ensure consistency and clarity with respect to the parties' expectations and obligations under the Sourcing Agreement. (*See* CCE Verified Reply Comments at 19-21.)

- **Accurate calculation of "Maximum DCQ."** Under the IPA's final draft sourcing agreement, "Maximum DCQ" is the maximum daily amount of SNG that Nicor Gas and Ameren Illinois collectively must buy. CCE highlighted that the technical calculation of the Maximum DCQ is incorrectly reflected in the IPA's final draft sourcing agreement, and proposed corrections. (*See* CCE Verified Reply Comments at 21-23.)

- **Clarification that "Title Transfer Point" is distinct from "Receiving Pipeline."** These terms are distinct and have different meanings in the Sourcing Agreement. The IPA's final draft sourcing agreement, however, contains some instances of inconsistent or confusing usages of these terms that could unintentionally be interpreted to suggest that the two terms are the same. CCE explained the difference between the two terms, and recommended corrections to avoid the potential misinterpretation. (*See* CCE Verified Reply Comments at 23-26.)

- **Correction regarding acceptance vs. delivery of SNG.** CCE noted that Section 5.1 contains an error that prevents it from harmonizing with other sections. CCE proposed corrections that remove an ambiguity in Section 5.1 to harmonize it with previous sections. (*See* CCE Verified Reply Comments at 26-27.)

- **Correction regarding the reference year used to calculate O&M escalation.** CCE noted that the IPA's final draft sourcing agreement contains an error that double-counts inflation, and proposed a remedy that will reduce the O&M component charge in the Sourcing Agreement. (*See* CCE Verified Reply Comments at 27-28.)

- **Clarification of fuel component calculation.** CCE identified an error in Schedule 5.2C that is inconsistent with other sections of the IPA's final draft sourcing agreement and the IPA Memorandum that the IPA provided to the Commission contemporaneous with its final draft sourcing agreement. (*See* CCE Verified Reply Comments at 28-30.)

- **Clarification of Notice to Proceed references.** "Notice of Proceed" is a defined term in the Sourcing Agreement. CCE highlighted two locations in the final draft Sourcing Agreement where "notice to proceed to construction" rather than "Notice to Proceed," was used, which incorrectly obscured the intent to refer to the defined term in those instances. (*See* CCE Verified Reply Comments at 30-31.)

- **Correction to remove reference to a nonexistent Exhibit 1.** CCE noted that there is a reference to an Exhibit 1 that does not exist. (*See* CCE Verified Reply Comments at 31-32.)

- **Addition of definition of "Annualized Daily Average."** CCE averred that the IPA's final draft sourcing agreement contains a term, "Annualized Daily Average," that was introduced for the first time in the IPA's final draft sourcing agreement and does not have a definition. CCE proposed adding a definition consistent with the definition of the parallel term "Monthly Annualized Average." (*See* CCE Verified Reply Comments at 33.)

- **Clarification of definition of "Title Transfer Point."** CCE juxtaposed the definition "Title Transfer Point" with other definitions that reference the specific section where the defined term is addressed. CCE proposed making the references in the "Title Transfer Point" definition consistent with the other definitions. (*See* CCE Verified Reply Comments at 33.)

- **Clarification of definition of "Transportation and Marketing Component."** CCE also juxtaposed the definition "Transportation and Marketing Component" with other definitions that reference the specific section where the defined term is addressed. CCE proposed making the references in the "Transportation and Marketing Component" definition consistent with the other definitions. (*See* CCE Verified Reply Comments at 34.)

- **Deletion of schedule entitled "Annex A: Monthly Contract Quantity."** CCE illustrated that this schedule was rendered vestigial by other sections of the IPA's final draft sourcing agreement. (*See* CCE Verified Reply Comments at 34.)

- **Formatting Corrections.** CCE identified several locations where formatting was inconsistent with the rest of the document. (*See* CCE Verified Reply Comments at 34.)

In its Verified Reply, CCE explained that only one revision should be made to the various typographical and scrivener's errors that CCE originally identified in the CCE Corrected Agreement. CCE observed that the addition of the word "Conforming" a second time in Section 4.2 of the IPA's final draft sourcing agreement is not necessary and may cause additional confusion. With that one exception, CCE maintains that the CCE Corrected Agreement properly identified the typographical and scrivener's errors in the IPA's final draft sourcing agreement. In addition, CCE agrees with the IPA's position on Sections 12.5(a) and (b). These changes are reflected in Appendices A and B.

Staff Position

Staff identified several areas where it recommends changes to the IPA's final draft sourcing agreement. Staff proposed changes included:

- A change in the dollar amount in the "Monthly Base Overage Amount" definition. (*See* Staff Position Statement at 8-9.)
- Revisions to the Fuel Charge Billing Determinants that Staff avers would make the language consistent with the parties' intent. (*See id.* at 9-12.)
- Resolution of potential contradictions in information about how to calculate the natural gas utilities' share of SNG. (*See id.* at 18-21.)
- Updates to definitions for "Annualized Daily Average" and "Buyer's Sharing Percentage"
- Addressing certain errors identified by CCE in its December 14 filing. (*See* Staff Exhibit D.)

Although Staff acknowledged that its proposed changes are not scrivener's errors or typographical errors, Staff also proposed several changes to the "Contract Savings Guaranty," the "Contract Savings Reconciliation," and "Security for Contract Savings Guaranty Shortfall Amount" provisions in the IPA's final draft sourcing agreement. (*See id.* at 3-8.) In addition, Staff argued that the Commission should either accept the proposed recovery of costs in the IPA's final draft sourcing agreement or, alternatively, adjust the rates to allow recovery at a slightly lower percentage. (*See id.* at 12-18.)

IPA's Position

The IPA supported certain of CCE's proposed changes, but rejected others on the grounds that they substantively changed the contract. (*See* IPA Statement of Position at 2.) The IPA provided its own proposed list of errors as well. (*See* IPA Exhibit 3.)

The AG's Position

The AG raised issues with cost recovery in the event of carbon sequestration compliance. (*See* AG Statement of Positions at 1-3.)

Nicor Gas's Position

Nicor Gas presented several issues that it does not characterize as scrivener's or typographical errors, but rather substantive changes, such as cost allocation and proper rate of return if the ratio of debt to equity is changed. (*See* Nicor Gas Statement of Positions at 2-11.)

COMMISSION ANALYSIS AND CONCLUSIONS

The Commission's authority to modify the Sourcing Agreement is specifically limited by recent legislation that clarifies the Commission's role in the Sourcing Agreement approval process. Modifications beyond those permitted in that legislation are beyond the Commission's statutorily-defined limited role with respect to the sourcing agreement development process. This follows from the fundamental rule of administrative law that "The Commission derives its power and authority solely from the statute creating it, and it may not, by its own acts, extend its jurisdiction." (*Sheffler v. Commonwealth Edison Co.*, 399 Ill. App. 3d 51, 60, 923 N.E.2d 1259, 1268 (1st Dist. 2010), *aff'd* 955 N.E.2d 1110 (Ill. 2011); *see also Harrison Tel. Co. v. Ill. Commerce Comm'n*, 343 Ill. App. 3d 517, 523, 797 N.E.2d 183, 189 (5th Dist. 2003) (same), *aff'd* 212 Ill. 2d 237, 817 N.E.2d 479 (2004).

Consistent with the new legislation, the Commission will correct the typographical and scriveners errors presented by CCE. Under Illinois law, scrivener's errors are errors where the intent of parties to a contract or document is not reflected in the final writing. (*See, e.g.*, *Gray v. Nat'l Restoration Sys., Inc.*, 354 Ill. App. 3d 345, 371, 820 N.E.2d 943, 965-66 (Ill. App. Ct. 1st Dist. 2004) (Campbell, J. dissenting) (collecting and summarizing rule from Illinois precedent).)

To wit, "Several Illinois cases have confronted the issue of a scrivener's error. In each instance, the correction was mechanical or technical in nature, not decisional or judgmental." (820 N.E. 2d at 965; *see also Schaffner v. 514 West Grant Pl. Condominium Ass'n Inc. III*, 756 N.E.2d 854 (Ill. App. Ct. 1st Dist. 2001) (similar summary of Illinois law).)

The Commission notes that in complex contract drafting, scrivener's errors and typographical errors can lead to unintended consequences that the parties did not or could not have specifically contemplated. In addition, although the Commission would be wary if parties were attempting to correct "errors" to gain an advantage in an arms-length transaction, CCE has established that its proposed correction are mechanical or technical changes, consistent with reflecting the parties' intent and internal consistency in the document. The Commission does not find anything in CCE's suggested modifications that asks the Commission to go beyond its limited statutory mandate or to tip the balance of the Sourcing Agreement to favor or disfavor any party. Further, although certain comments from Staff and other parties identify some arguably valid areas in which the Commission might have decided a particular issue differently if that issue were to be decided by the Commission under a different statutory scheme, that is not the applicable standard upon which the Commission must proceed given its limited statutory role. Accordingly, the Commission declines to implement the changes proposed by Staff, the AG, and Nicor Gas.

III.

MODIFICATION OF TERMINATION PROVISIONS

CCE's Position

CCE proposed to delete Subsection 1.2(h) as well as Section 14.20 of the final draft Sourcing Agreement to comply with Public Act 97-0630. Section 14.20 – a non-severability

clause -- provides for potential termination of the entire agreement under certain circumstances, and CCE averred that it became aware of the natural gas utilities' intention to affirmatively use Section 14.20 to terminate the entire agreement, which would obviously be contrary to the overall statutory mandate.

Nicor Gas's Position

Nicor Gas argued that Section 14.20 should not be removed because CCE originally authored the provision. (*See* Nicor Exhibit C at 2.)

Staff's Position

Staff did not object to striking Subsection 1.2(h) as CCE proposed. (*See* Staff Statement of Positions at 23.) However, Staff did object to deleting the non-severability provision in Section 14.20 of the final draft Sourcing Agreement as not covered by Public Act 97-0630. (*See id.* at 23-24.)

COMMISSION ANALYSIS AND CONCLUSIONS

The Commission adopts CCE's proposed deletions. The deletions of Sections 1.2(h) and 14.20 are both consistent with the letter and intent of Public Act 97-0630 (now codified as Section 9-220(h-4) of the Act, which is clearly meant to result in a Sourcing Agreement which is subject to termination in only limited and specifically delineated circumstances. Leaving either of those provisions in the Sourcing Agreement would create a potential situation where the Sourcing Agreement might be terminated as a result of a circumstance not contemplated in Public Act 97-0630 – an outcome that would (by definition) be directly contrary to the plain legislative intent as reflect in the language of the Public Act.

Weighed against the clear statutory language, we find unpersuasive the Staff's position regarding the non-severability provision in Section 14.2. The statutory language precludes the

possibility that a utility should be permitted to terminate under circumstances other than those specified in the statute, and inclusion of Section 14.2 would contradict that requirement, so the provision must be removed. Also, the fact that CCE originally proposed Section 14.20 is not relevant. Public Act 97-0630 permits certain contractual language and requires deletion of other contractual language, and the Act's dictates are not dependent upon whether a particular party or Agency may or may not have suggested language during mediation proceedings or at any other time.

IV.

OTHER ISSUES

Nicor Gas, the AG, and Staff all raised issues relating to either changes that the parties would like to see in the final draft Sourcing Agreement that are not allowed by Public Act 97-0630 or that impact the Commission's duty to add in certain values identified in the Interim Proposed Order. As stated above, and without evaluating the merits of any individual recommendation, the Commission's authority in this proceeding is limited to that which is expressly provided in the Act, and the suggested revisions from Nicor, the AG, and Staff fall outside that statutory mandate and therefore outside of the Commission's authority.

IV.

SOURCING AGREEMENT

Attached as Appendix 1 is the Sourcing Agreement approved by the Commission that Nicor and Ameren Illinois are directed to execute within 45 days of this Final Order.

V.

FINDINGS AND ORDERING PARAGRAPHS

The Commission, having reviewed the entire record, is of the opinion and finds that:

(1) Nicor and Ameren Illinois are Illinois corporations and are public utilities as defined in Section 3-105 of the Public Utilities Act ("Act");

(2) Chicago Clean Energy, LLC is a facility operator as defined in Public Act 97-0096;

(3) the Commission has jurisdiction over the parties hereto and the subject matter hereof;

(4) the recitals of fact and conclusions reached in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact;

(5) as required by Section 9-220(h-4) the Commission has modified the final draft sourcing agreement provided by the IPA and approved the sourcing agreement that is attached hereto as Appendix 1.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that within 45 days of this Final Order, Nicor and Ameren shall enter into the sourcing agreement that is attached hereto as Appendix 1.

IT IS FURTHER ORDERED that, subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

DATED: January ___, 2012

Respectfully submitted,

CHICAGO CLEAN ENERGY, LLC

By: /s/ Christopher J. Townsend
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